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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1352

ROBERT B. J. MULVANEY and MILTON YORMARK,
Petitioners,

v.

STATE OF NEW JERSEY,
Respondent.

REPLY OF PETITIONERS ROBERT B. J. MULVANEY AND MILTON YORMARK ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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If four false accident claims are filed to defraud the same insurance company, no principle of law bars separate prosecutions for each alleged substantive offense.[1] Nothing in the instant petition seeks any change in that proper and effective tool of law enforcement. This petition does challenge, however, the prosecutorial tactic by which each such false claim—involving the same target company, the same *modus operandi*, virtually the same participants, and the same time span—is hypothesized to have arisen

[1] This Court has firmly rejected the "same transaction" theory of Double Jeopardy, *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and no such theory is advanced herein.

from separate conspiratorial agreements. That tactic declares war upon the protection embodied in the Double Jeopardy Clause of the Constitution. It unleashes multiple conspiracy prosecutions extracted at will from a single scheme, and thus enables the State to place a man "twice in jeopardy," at least, for the "same offense". In this case, petitioner Mulvaney was put in jeopardy for a fourth time after prior acquittal on three false claim charges and three conspiracy counts extracted from them.[2]

With respect to the fourth false claim, Mulvaney was tried, not for participation in the substantive crime, but for membership in an allegedly fourth and "different" conspiracy underlying it. The State's response to this petition for writ of certiorari candidly acknowledges that the test for determining whether a "different" conspiracy exists is well-settled and fully applicable to the States for Double Jeopardy purposes. "The test is whether the conspiring parties entertain 'a common, continuing objective' embracing a series of criminal acts." (St. Br. p. 8). The burden of New Jersey's effort to avoid review here is an attempt to show that no such "common continuing objective" underlay the four false claims. It is vital in that regard to observe what the State does not dispute as well as what it points to as evidence of a fourth and "different" conspiracy.

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[2] Ironically, the State attempts to tar Mulvaney with not having argued "one conspiracy" before, during or "after" the first trial. (St. Br. p. 10) But unaware that a second trial would follow, Mulvaney apparently was content to rest upon his claim of innocence which the jury endorsed.

There is no dispute that all four claims and the four alleged conspiracies transpired during the same time period.[3] There is no dispute that the same insurance company was the target of the fraud or that the "hub" figure in all claims was the company's insider. There is no dispute that the *modus operandi* of all four claims was the same in every important respect, or that Mulvaney's role, vindicated by the prior jury, was the same as among the claims.

Upon what then does the State rely to rebut " 'a common, continuing objective' embracing a series of criminal acts?" Three thin factual allegations are offered:

1. Each claim is said to have been initiated pursuant to a separate telephone conversation between Cortese and Perwin, although the State ironically admits that, even as to this detail of the *modus operandi*, "the same pattern of events took place as before".[4] (St. Br. p. 10).

2. One claim involved fabricating an accident other than a fall (St. Br. 6).

3. A new figure, Vincent Morelli, was intimately involved in one, but not all, claims.

It is fundamental conspiracy law that the mere addition of a new conspirator does not lead to the

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[3] For a graphic illustration of the overlapping nature of the claims, see Petition, p. 7, note 8.

[4] Moreover, each conversation was a signal triggering a new claim, not a new agreement. Although the State conclusorily contends otherwise, it provides this Court with no supporting record citations.

formation of a "different" conspiracy.[5] *Lile* v. *United States*, 264 F. 2d 278 (9th Cir. 1959); see also *United States* v. *Wenzel*, 311 F. 2d 164 (4th Cir. 1962); *United States* v. *Kellerman*, 431 F. 2d 319 (2d Cir. 1970). Each of the other factual bases for carving up the scheme into separate conspiratorial agreements is no less gossamer. No doctrine known to conspiracy law even hints that all criminal objects of a single criminal scheme must be identical in all details or that each criminal act, pursuant to an established scheme, must have been conceived at the same moment. Only on appeal does the State take its convenient position. To the jury, it argued vigorously that each false claim was generated by a criminal apparatus, working "just like clockwork" (T-10, 380). This Court should not tolerate being told now that there was a new clock each time.

We recognize that whether a continuing scheme consists of one or more conspiracies is heavily dependent upon factual considerations varying from case to case. But this Court should not deny review upon that basis. For the question is by no means simply a matter of fact. To regard it as such is to abdicate to the jury, not simply the task of defining the "elastic, sprawling and pervasive offense" of conspiracy, *Krulewitch* v. *United States*, 336 U.S. 440, 445-46, but of giving meaning to the "same offense"

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[5] Typical of the statements articulating the law is: "After a conspiracy has been formed, the adherence to the criminal design by a new confederate does not constitute a different conspiracy." 264 F. 2d at 281.

criterion written into the Double Jeopardy Clause. Without legal guideance from the courts, juries are utterly unsuited to perform tasks of such moment.

Above all, it is for this Court to speak. Even if it cannot provide a bright-line definition of the conspiracy offense that will eliminate all Double Jeopardy issues, it can at least define minimum guidelines to be met before a continuing scheme may constitutionally be presented to more than one jury as more than one conspiracy. This Court has traditionally and usefully performed such a guideline function in related areas which likewise rest heavily upon particular factual constellations. (Cf. *Kotteakos* v. *United States*, 328 U.S. 750 (1946) with *Berger* v. *United States*, 295 U.S. 78 (1935) setting out the parameters of permissible variance in conspiracy cases.)

This case is a fully appropriate vehicle in which to announce such guidelines. It presents a set of facts which define the intolerable. The false claim scheme, masterminded and run by others, was simple, continuing, and repetitive. Petitioner Mulvaney proved himself innocently involved in three carved-up conspiracy charges and three ensuing false claims. But he was unable to do it again when a fourth conspiracy charge was presented to a new jury and evidence of his prior innocent involvement was admitted to show the similarity of the scheme the State insists was multiple. Mulvaney was, of course, never convicted of any substantive false claim and there

was no need even to charge him with that substantive crime if the conspiracy doctrine may be used as oppressively as it was here. No interest of law enforcement requires such prosecutorial latitude.[6] More importantly, the Constitution forbids it. This Court should take this occasion to say so.

Respectfully submitted,

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June 5, 1972

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[6] New Jersey sets out the charging alternatives open to it at p. 14 of its Brief. They prove the merit of this Petition. Apparently, the State claims to have rejected trying all four claims in one case upon the ground that petitioner Yormark and another defendant would have been prejudiced by evidence of the claims as to which they were not involved. *But evidence of those claims was introduced at the second trial by the State itself*, thereby infecting that trial with the prejudice upon which petitioner Yormark relies herein. (Pet. p. 20). Likewise, the State claims to have rejected trying all four claims against petitioner Mulvaney in one trial upon the ground that two trials of the Taylor claim would have "wasted the time of the trial court as well as that of the State and the defendants." (St. Br. p. 14). But two trials were held anyway and the substance of the first trial was relitigated in the second. The time of the court was not reduced and the time of the defendant Mulvaney was multiplied. Only the State was advantaged by placing him, and others, twice in jeopardy.